**No. 10-5433**

---

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

---

STEPHEN LAROQUE, ET AL.,

*APPELLANTS*,

V.

ERIC H. HOLDER, JR., ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,

*APPELLEES*.

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA (NO. 10-561 (JDB))

---

# INTERVENOR-APPELLEES' OPPOSITION TO APPELLANTS' MOTION TO EXPEDITE THE APPEAL

---

J. Gerald Hebert
*Lead Counsel*
Attorney at Law
191 Somerville Street, #405
Alexandria, VA 22304
Telephone: 703-628-4673
E-mail: hebert@voterlaw.com

Anita S. Earls
Allison J. Riggs
SOUTHERN COALITION FOR SOCIAL JUSTICE
115 Market Street, Ste. 470
Durham, NC 27617
Telephone: 919-323-3380 x115
E-mail: anita@scsj.org

Laughlin McDonald
AMERICAN CIVIL LIBERTIES UNION FOUNDATIONS, INC.
230 Peachtree Street, NW, Ste. 1440

Arthur Barry Spitzer
AMERICAN CIVIL LIBERTIES UNION
1400 20th Street, NW, Ste. 119

Atlanta, GA 30303-1227
Telephone: 404-523-2721
Email: lmcdonald@aclu.org

Washington, DC 20036
Telephone: 202-457-0800 x113
Email: artspitzer@aol.com

*Counsel for Intervenor-Appellees*

# TABLE OF CONTENTS

TABLE OF AUTHORITIES……ii

INTRODUCTION……1

ARGUMENT……2

I. APPELLANTS HAVE NOT OFFERED A STRONGLY COMPELLING REASON TO JUSTIFY EXPEDITING THIS APPEAL……..2

II. AN EXPEDITED APPEAL WILL NOT PREVENT ANY OF THE ALLEGED INJURIES TO APPELLANTS, AND THE ISSUES RAISED IN APPELLANTS' MOTION TO EXPEDITE HIGHLIGHT THE WEAKNESS OF THEIR APPEAL…...……8

CONCLUSION……...…12

CERTIFICATE OF SERVICE

# TABLE OF AUTHORITIES

## CASES

*Comm. on the Judiciary v. Miers*, 542 F.3d 909 (D.C. Cir. 2008)……..3

*Kilgarlin v. Hill*, 386 U.S. 120 (1967)…….….5

*League of United Latin American Citizens v. Perry*, 126 S. Ct. 2594 (2006)……5-6

**Morris v. Gressette*, 432 U.S. 491 (1977)…….……10

*Nw. Austin Mun. Util. Dist. No. 1 v. Mukasey*, F.Supp. 2d 221 (D.C. Cir. 2008)…….……..……6-7

*Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 129 S. Ct. 2504 (2009)……6-7

*Shelby Cnty. v. Holder*, No. 10-651(D.D.C.)…….8

*Warth v. Seldin*, 422 U.S. 490, 509-510…….……..…11

## STATUTES

*42 U.S.C. § 1973c……1

Miss. Code Ann. § 5-3-123 (2010)……...…….5

Va. Code Ann. § 24.2-311 (2010). ……..……..5

## RULES AND REGULATIONS

*D.C. Cir. Handbook of Practice & Internal Procedures ……....2

* Authorities upon which we chiefly rely are marked with asterisks

## INTRODUCTION

Appellants assert a facial and as-applied challenge to the 2006 Congressional reauthorization of Section 5 of the 1965 Voting Rights Act, 42 U.S.C. § 1973c, *see* Mem. Op., Dkt. No. 42 at 1, and hope to realize the political gains they believe they would accrue by a court invalidating Section 5 prior to the implementation of redistricting plans passed by covered jurisdictions in 2011. However, their political aspiration to impact the upcoming round of redistricting prior to the 2012 elections is not a sufficient justification to expedite the appeal in this matter. Indeed, the complexity of the numerous issues involved in this case, and the careful consideration those issues deserve, mandate that the parties and the Court have sufficient time to review the lower court's opinion and the precedents supporting it.

The essence of the lower court's ruling is that Appellants do not have standing nor a valid cause of action to bring this constitutional challenge. The District Court explained that, "whether for lack of standing or for lack of cause of action, plaintiffs' facial challenge to the constitutionality of Section 5, based on Section 5's application to Kinston, must be dismissed." See Mem. Op., Dkt. No. 42 at 19.

An expedited appeal would not best serve this Court's review of the issues under appeal. This is not a one-note appeal. The pleadings filed in this case thus far have been voluminous. Pleadings filed by Appellants and Appellees cited hundreds of cases, and the Memorandum of Opinion issued by the District Court was a lengthy and thoughtful review of the arguments and precedents involved in this complex constitutional litigation. Allowing the parties the full time usually allotted for the briefing schedule would provide this Court with more meticulous, helpful materials for its consideration.

## ARGUMENT

Appellants now seek to expedite their appeal based on this Court's authority to expedite an appeal when either the "public generally…ha[s] an unusual interest in prompt disposition…[and the] reasons must be strongly compelling" or the movant demonstrates "the delay will cause irreparable injury and that the decision under review is subject to substantial challenge". *See* D.C. Cir. Handbook of Practice & Internal Procedures at 3. These motions are "very rarely" granted. *Id.* The Appellants have not shown that either justification for expedited appeal applies to them.

### I. APPELLANTS HAVE NOT OFFERED A STRONGLY COMPELLING REASON TO JUSTIFY EXPEDITING THIS APPEAL

Appellants cite to no case arising in similar circumstances, *i.e.*, where an expedited appeal to determine the fundamental jurisdictional issues of standing and whether the plaintiffs have a valid cause of action was permitted by this Court. Indeed, this Court recently addressed the issues of grounds for an expedited appeal. In *Comm. on the Judiciary v. Miers*, 542 F.3d 909, 911 (D.C. Cir. 2008), a case which raised substantial issues of executive branch privilege, this Court denied a request to expedite the appeal. The *Miers* court explained: "The present dispute is of potentially great significance for the balance of power between the Legislative and Executive Branches. But the Committee recognizes that, even if expedited, this controversy will not be fully and finally resolved by the Judicial Branch—including resolution by a panel and possible rehearing by this court en banc and by the Supreme Court—before the 110th Congress ends on January 3, 2009." *Id.* at 911. In light of this fact, the Court saw no reason to expedite the briefing schedule and saw great benefit to not rushing the consideration of the case. *Id.* at 912 (J. Tatel, concurring). Similarly, in this case, there is no realistic possibility of resolving the case within the Appellants' desired timeframe even if the appeal is expedited, and therefore there is no strongly compelling reason to rush the proceedings.

Appellants seek to strike down a key civil rights law that was reauthorized in August 2006—more than four years ago. Having delayed to file suit, they are now

in the position where an expedited appeal on the standing issue will not prevent the harm they assert may occur without it. They are certainly not in a position to maintain that an enforceable judgment could be obtained in time for the non-partisan election scheme objected to by the Attorney General to be implemented for the City Council elections of November 2011. Even if this Court were to rule on the standing question in the next few months, the case must still go back for decision on the merits and likely appeal relating to that decision. It is unrealistic to assert that this matter will be completely resolved by late October of this year. If expediency were truly as necessary as Appellants suggest, and if the Attorney General's refusal to preclear the referendum was "entirely irrelevant" to Appellant's standing to bring this suit (*see infra* p. 9), then Appellants should have instituted this action much earlier than in April of 2010. *See* Compl., Dkt. No 1 (filed April 7, 2010). Appellants' delay is neither a strongly compelling reason for an expedited appeal nor a justification for imposing an extra burden on this Court and the parties. Indeed, Appellants' own delay warrants that this case proceed in the usual, non-expedited fashion.

Appellant' repeatedly use the upcoming 2011-2012 round of redistricting as a justification for the expedited appeal, *see* App. Mot. to Exped. Appeal, Dkt. No. 1286695 at 2, 7-10, but this reason alone is not enough to justify an expedited schedule. This case is a facial challenge to Section 5, which applies to all kinds of

voting-related changes, and not just redistricting. To paint the significance of striking down this law solely in terms of the upcoming redistricting cycle severely underestimates and misapprehends the true significance of this legislation.

And even solely in regards to redistricting, a significant portion of the redistricting that will be done in response to the 2010 Census will be completed well before this case is resolved on the merits, even with an expedited appeal here. Many local jurisdictions and some covered states will have new district plans in place for November 2011 elections.[1] Many covered states must have new plans in place in time for filing deadlines in early 2012. But according to Appellants, if the district court does not invalidate Section 5 before November of 2011, "electoral chaos" will ensue. *See* App. Mot. to Exped. Appeal, Dkt. No. 1286695 at 2.

First, regardless of the hyperbole, the reality is that the timeline created by Appellants is completely unrealistic. Even a ruling by this Court before the Summer of 2011, as requested by Appellants, *see id.*, would not lead to a decision on the merits in time to invalidate Section 5 before any redistricting has taken place. Thus, the "chaotic" consequences prognosticated by Appellants will not be avoided by expediting this appeal.

---

[1] For example, Virginia's legislative redistricting plan must be in place prior to House and Senate elections that are scheduled for November 2011. Va. Code Ann. § 24.2-311 (2010). Also, Mississippi's congressional redistricting plan must be in place 30 days before the first regular session of the legislature after the census results are released. Miss. Code Ann. § 5-3-123 (2010).

Second, it is not uncommon in redistricting litigation for courts, even finding constitutional violations in redistricting plans, to order elections under existing plans, particularly where the election process is already underway and exigent circumstances exist. *Kilgarlin v. Hill*, 386 U.S. 120, 120-121 (1967). Finally, the United States Supreme Court, even when presented with the opportunity, has not suggested that mid-decade redistricting is unconstitutionally or intolerably disruptive, *see League of United Latin American Citizens v. Perry*, 126 S. Ct. 2594, 2607 (2006) (no majority opinion reaching the merits of several distinct challenges to mid-decade redistricting raised by appellants) as claimed by the Appellants. *See* App. Mot. to Exped. Appeal, Dkt. No. 1286695 at 8. In order to defend their request for an expedited appeal, Appellants have created an impossible timeline and predicted chaos if it is not closely obeyed, but this does not create the strongly compelling legal justification required for expediting an appeal.

Interestingly, Appellants assume the continued applicability of Section 5 will have "a sweeping effect on this decade's redistricting process and the resulting electoral landscape nationwide," *see* App. Mot. to Exped. Appeal, Dkt. No. 1286695 at 2, which implies that covered jurisdictions want to draw redistricting plans that are retrogressive and the continued applicability of Section 5 is all that is stopping them. This is by no means a strongly compelling reason for expedited appeal. Moreover, there is no reason to believe, as Appellants suggest, that every

member of the Supreme Court is eager to strike down Section 5 of the Voting Rights Act. *See* App. Mot. to Exped. Appeal, Dkt. No. 1286695 at 8, *citing Northwest Austin Mun. Util. Dist. No. 1 v. Holder*, 129 S. Ct. 2504, 2513 (2009). Indeed, in *Northwest Austin*, the Court acknowledged that: "Congress amassed a sizable record in support of its decision to extend the preclearance requirements, a record the District Court determined 'document[ed] contemporary racial discrimination in covered states.'" 129 S.Ct. at 2513 (citing *Northwest Austin*, 573 F.Supp. 2d 221, 265 (D.C. Cir. 2008). The Court further held that "[i]t may be that . . . conditions continue to warrant preclearance under the Act." 129 S.Ct.. at 2511-12. Thus, the Supreme Court's statements that conditions continue to exist that may warrant Section 5 preclearance, and that Congress amassed a sizable record in support of its decision to extend the preclearance requirements, undercuts Appellants' argument that the Court is eager to invalidate Section 5. In addition, by expanding the definition of jurisdictions entitled to bail out from Section 5, the Court went to great lengths to avoid addressing the issue of the constitutionality of Section 5. The mere fact that the statute raises a constitutional question does not determine how that question ultimately will be answered. Statements in the Court's opinion in the *Northwest Austin* case are not an automatic guarantee that the Court will strike down Section 5 of the Voting Rights Act as unconstitutional. Again, Appellants' purportedly "strongly compelling" justifications for expediting

the appeal are grounded in nothing more than unsupported assumptions and hyperbole.

Finally, facilitating consolidation of the instant case with the other pending facial challenge to Section 5, *Shelby Cnty. v. Holder*, No. 10-651(D.D.C.), is also not sufficient justification for expediting this appeal. Appellants have read into the district court's decision to expedite its resolution of the instant case a justification relating to resolution of all Section 5 challenges before the 2012 elections, *See* App. Mot. to Exped. Appeal, Dkt. No. 1286695 at 10. But there is no reason to conclude that the court below was compelled by any other reason than to ease the district court's consideration of two parallel challenges. Ultimately, consolidation of the two cases is not a strongly compelling reason for expediting this appeal.

This Court is under no obligation to contort its schedule to comply with the demands of Appellants. Under their theory of standing and of the case, Appellants could have filed this case much earlier, thus obviating the need for urgency now. Their delay, their political motivations, and their unreasonable timeline do not justify the need for an expedited appeal.

## II. AN EXPEDITED APPEAL WILL NOT PREVENT ANY OF THE ALLEGED INJURIES TO APPELLANTS, AND THE ISSUES RAISED IN APPELLANTS' MOTION TO EXPEDITE HIGHLIGHT THE WEAKNESS OF THEIR APPEAL.

Appellants also have not met the second test for granting an expedited appeal. They have not demonstrated that delay would cause Appellants'

irreparable injury, and they have not outlined a substantial challenge worthy of depriving this Court of the time for careful consideration that it needs in important cases.

Following a normal appeals schedule before this Court will not cause Appellants irreparable injury. The injury that is alleged to be at stake would be that individual Appellants have to run for the Kinston City Council in partisan, as opposed to non-partisan, elections. However, as mentioned above, *supra* p. 3-4, it is simply incomprehensible to believe that this Court could decide the standing issue, have its decision appealed, and then get the case back to the District Court for a decision on the merits and then again through the appeals process in time for the referendum to be in effect for the November 2011 Kinston City Council elections. Thus, the alleged injury (which Intervenor-Appellees do not concede exists) will occur regardless of whether this appeal is expedited. Delay here will not be the trigger for that claimed injury.

Ultimately, Appellants' Motion for Expedited Appeal does not need to be granted because the appeal they seek to bring is a weak one, not a substantial challenge. The District Court delved into the lack of standing and a valid cause of action in great detail in the Memorandum Opinion issued on December 20, 2010, and it rightly decided the issue. See Mem. Op., Dkt. No. 42 at 19. The court below explored every possible theory for standing, and found that case law did not

support a finding of injury sufficient to convey standing—not injury as proponents of the referendum, or injury as potential candidates for office in 2011, or injury as voters in 2011 local elections. *See id.* at 20, 27, 39. The District Court also found that Appellants could not show a likelihood that a favorable decision by the court would even remedy the alleged injury suffered. *See id.* at 43. Appellants' attack the District Court's discussion of nullification and redressability, *see* Mem. Op., Dkt. No. 42 at 44-45, but they ignore the extensive analysis the District Court had just performed concluding that there had been no injury.

In its Memorandum Opinion, the District Court also fully addresses the cause of action issue. *See* Mem. Op., Dkt. No. 42 at 46. The court below noted that in order to establish any argument for standing, the individual plaintiffs had to "premise their two broad constitutional challenges to Section 5 on the personal injuries that they allegedly suffered as a result of the Attorney General's refusal to preclear Kinston's proposed change to nonpartisan elections." See id. at 49. Thus, Appellants claim that "whether the Attorney General's refusal to preclear the referendum was a proper exercise of discretion under § 5 is entirely irrelevant to Appellants' facial challenge and their standing to raise that claim" rings false. *See* App. Mot. to Exped. Appeal, Dkt. No. 1286695 at 18 (italics and internal citations omitted). The District Court recognized that Appellants would have no standing for a facial challenge without, in effect, bringing an as-applied challenge to Section

5, and the text of the Voting Rights Act and interpreting courts have prohibited this. *Morris v. Gressette*, 432 U.S. 491, 501 (1977). Thus, the District Court rightly concluded that Appellants did not have a valid cause of action to bring this suit. *See* Mem. Op., Dkt. No. 42 at 53.

Appellants claim to have a substantial challenge, but they cannot point to a single case where their theory of the case would cause them to prevail on the standing and cause of action issues. They could not provide this precedent in their briefs in opposition to the Motions to Dismiss, and they cannot provide it now. Instead, Appellants insist that the result the District Court arrived at is absurd and in effect allowed Congress to pass a law that no one, not even the city of Kinston itself, could challenge. *See* App. Mot. to Exped. Appeal, Dkt. No. 1286695 at 15. This is wrong and is not a reasonable interpretation of the District Court's opinion.

Most importantly, Appellants disregard the fact there are proper parties to bring a facial challenge to Section 5 of the Voting Rights Act. Where challengers are not regulated by the law in question, it is even more difficult to establish standing. *Warth v. Seldin*, 422 U.S. 490, 509-510 (holding that plaintiffs lacked third-party standing because they were not subject to zoning regulations). In this case, Section 5 regulates covered jurisdictions (such as States and political subdivisions), not Appellants. No one challenges that covered jurisdictions have standing to challenge Section 5. Indeed, in its Memorandum Opinion, the District

Court summarized the "essential inquiry" as "whether five private persons and a private membership organization ought to be able to challenge the constitutionality of Section 5—a statute that does not apply to individual voters or candidates for local political office, but instead regulates the conduct of covered jurisdictions." *See* Mem. Op., Dkt. No. 42 at 18. The District Court performed an exacting analysis of this "essential inquiry," and Appellants' hyperbolic attack on the District Court's analysis does nothing to substantively rebut the key points in that opinion. Nothing presented in Appellants' Motion to Expedite the Appeal demonstrates that the delay caused by not expediting the appeal will cause irreparable injury to the Appellants, nor does the Motion demonstrate how the appeal presents a substantial challenge to the decision under review.

## CONCLUSION

For the abovementioned reasons, Intervenor-Appellees respectfully request that this Court deny Appellants' Motion for Expedited Appeal. If this Court does grant the motion, Intervenor-Appellees respectfully requests a normal, not abbreviated, briefing schedule, giving Intervenor-Appellees the standard 30 days to submit their response brief.

This, the 12th day of January, 2011.

Respectfully submitted,

/s/ J. Gerald Hebert
J. Gerald Hebert
D.C. Bar #447676
Attorney at Law
191 Somerville Street, #405
Alexandria, VA 22304
Telephone: 703-628-4673
E-mail: hebert@voterlaw.com

Anita S. Earls
D.C. Bar #473453
N.C. Bar #15597
Allison J. Riggs
N.C. Bar #40028
Southern Coalition for Social Justice
115 Market Street, Ste. 470
Durham, North Carolina 27701
Telephone: 919-323-3380 ext. 115
Facsimile: 919-323-3942
E-mail: anita@scsj.org
allison@scsj.org

Laughlin McDonald
American Civil Liberties Union
Foundations, Inc.
230 Peachtree Street, NW Suite 1440
Atlanta, GA 30303-1227
Telephone: 404-523-2721
Facsimile: 404-653-0331
E-mail: lmcdonald@aclu.org

Arthur Barry Spitzer
American Civil Liberties Union
1400 20th Street, NW, Suite 119
Washington, DC 20036
Telephone: 202-457-0800 x113
E-mail: artspitzer@aol.com
*Counsel for Intervenor-Appellees*

## CERTIFICATE OF SERVICE

I hereby certify that, on this, the 12th day of January, 2011, I electronically filed the original of the foregoing document with the clerk of this Court by suing the CM/EMF system, and I also filed four copies of the foregoing document, by hand delivery, with the clerk of this Court.

I further certify that, on this, the 12th day of January, I caused the foregoing document to be served via regular and electronic mail on the lead counsel (in the court below) for Appellants Stephen LaRoque, Anthony Cuomo, John Nix, Klay Northrup, Lee Raynor, and the Kinston Citizens for Non-Partisan Voting:

Michael Carvin
Jones Day
51 Louisiana Ave., NW
Washington, D.C. 20001
Telephone: 202-879-3939
Email: macarvin@jonesday.com

I further certify that, on this, the 12th day of January, I caused the foregoing document to be served via regular and electronic mail on the lead counsel (in the court below) for Appellee-Defendant Eric H. Holder, Jr., Attorney General of the United States:

Richard Alan Delheim
U.S. Department of Justice
Civil Rights Division, Voting Section
Room 7254 – MWB
950 Pennsylvania Ave., NW
Washington, DC 20530

Telephone: 202-305-1734
Email: richard.delheim@usdoj.gov

This the 12th day of January.

/s/ J. Gerald Hebert
J. Gerald Hebert
*Counsel for Intervenor-Appellees*